Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	
Regulatory Policies to Allow	)	**IB Docket No. 96-111**
Non-U.S.-Licensed Space Satellite	)	
Service in the United States	)	
(DISCO II)	)	

REPLY COMMENTS OF THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

1. The Office of the United States Trade Representative (USTR), on behalf of the statutory inter-agency trade policy organization of the Executive Branch (the Executive Branch), respectfully submits the following reply comments in response to the Federal Communication Commission's (FCC) Further Notice of Proposed Rulemaking (FNPRM) referenced above.[1] USTR has primary responsibility within the Executive Branch for developing and coordinating the implementation of U.S. international trade policy, including issuing and coordinating guidance on interpretation of U.S. international trade obligations, such as those arising under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).[2] USTR offers this reply to comments concerning U.S. rights and obligations under the WTO General Agreement on Trade in Services in the basic telecommunications services sector (GATS telecom

[1] USTR is the chair of the inter-agency organization created to advise the President on international trade policy. 19 U.S.C. § 1872(a); Executive Order 11846 of March 27, 1975.

[2] 19 U.S.C. § 2171(c)(1).

agreement).[3]

2. Section 301 of the Communications Act of 1934, as amended, (the Communications Act or the Act), prohibits radio communications within the jurisdiction of the United States "except under and in accordance with the Act and with a license in that behalf granted under the provisions of this Act."[4] Under Section 309 of the Act, the FCC may grant a Title III application for the provision of telecommunications services only if the FCC determines that doing so would serve the public interest, convenience, and necessity.[5]

3. The FCC regulates both communications satellites (space stations) and the earth stations with which they communicate as "radio stations" under the Act. Any earth station user or operator in the United States that wishes to send or receive transmissions over a satellite system must apply for and receive a Title III license to communicate with the satellite. In processing the application, the FCC conducts a public interest analysis.[6]

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[3] On February 15, 1997, 69 WTO members agreed to provide each other "market access" and national treatment in some or all of their basic telecommunications sectors. These commitments are embodied in the Fourth Protocol to the WTO General Agreement on Trade in Services (GATS) to which the participating members attached individual Schedules of Commitments and Lists of Article II Exemptions. The Fourth Protocol and attached commitments and exemptions are collectively referred to in this submission as the "GATS telecom agreement." The Fourth Protocol will enter into force on January 1, 1998, provided that all participating members have accepted it, or if some acceptances are lacking by December 1, 1997, on a date decided upon by those members who have accepted the Protocol.

[4] 47 U.S.C. § 301.

[5] 47 U.S.C. § 309.

[6] In its public interest analysis, the FCC considers, *inter alia*, the general significance of the proposed entry to the promotion of competition in the U.S. satellite services market, spectrum availability, compliance with technical rules and operating requirements, as well as national security, law enforcement, foreign policy, and trade policy concerns brought to the FCC's attention by the Executive Branch. The FCC accords deference to the views

4. In its May 14, 1996 *Notice of Proposed Rulemaking to Amend the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (DISCO II),* the FCC proposed a framework for allowing satellites not licensed by the United States (non-U.S. satellite systems) to provide service to the United States. In that notice, the FCC proposed to include in its public interest analysis of Title III applications to serve the United States through communications with non-U.S. satellite systems an examination of: (1) whether U.S. satellites have "effective competitive opportunities" in that foreign country (home market); and (2) whether such opportunities exist on the route markets that the foreign satellite operator seeks to serve from earth stations in the United States. This evaluation of home and route markets is referred to as the "ECO-Sat" test.[7]

5. In light of the recent conclusion of the GATS telecom agreement, the FCC adopted a *Further Notice of Proposed Rulemaking* (FNPRM) on July 16, 1997 requesting comments on its tentative conclusion not to apply the ECO-Sat test when evaluating Title III applications to provide services covered by the United States schedule of commitments under the GATS telecom agreement (covered services) using a satellite licensed by a WTO member country. Under the FNPRM, the FCC would presume that the proposed entry promotes competition in the U.S. market. To rebut this presumption, opposing parties would have to demonstrate that the

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of the Executive Branch on those concerns because they are uniquely within its competence.

[7] The FCC noted in its May 14 *Notice* that it would continue considering other public interest factors including spectrum availability and technical coordination, and compliance with FCC technical and service rules and policies, as well as Executive Branch concerns regarding national security, law enforcement, foreign policy, and trade policy.

grant of the application would pose a very high risk to competition in the U.S. market that could not be resolved by conditions the FCC could place on the license.

6. The FNPRM noted that the FCC intends to adopt the previously proposed ECO-Sat test for satellites licensed by non-WTO member countries and for non-covered services, *i.e.*, telecom and non-broadcast services for which the United States has scheduled neither a market access nor national treatment commitment and has scheduled an exemption from its most-favored-nation (MFN) obligations under the GATS. These services are Direct-to-Home Fixed-Satellite Service (DTH-FSS), Direct Broadcast Satellite Service (DBS), and Digital Audio Radio Service (DARS). In the FNPRM, the FCC also requested comments on application of the ECO-Sat test or an alternative to intergovernmental satellite organizations (IGOs) and on its proposal not to apply the ECO-Sat test to Title III applications to use satellites of IGO affiliates if the affiliates are incorporated or headquartered in a WTO member country.

7. The FNPRM further noted that the FCC would continue to accord deference to the Executive Branch on matters uniquely within its competence that the Executive Branch brings to the FCC's attention, *i.e.*, national security, law enforcement, foreign policy, and trade policy concerns.

8. Some commenters in this proceeding have contended that the FCC's denial or conditioning of a Title III license for the provision of covered services using a non-U.S. satellite system licensed by a WTO member country as a result of the application of the public interest

analysis would be inconsistent with U.S. market access, domestic regulation, national treatment, and MFN treatment obligations under the GATS telecom agreement.

9. Nothing in the GATS telecom agreement precludes application by the FCC of its statutory public interest standard. The entry into force of the agreement will fundamentally improve the competitive landscape for satellite services. As a result, USTR agrees with the FCC's preliminary determination that it should not apply the ECO-Sat test as part of its public interest analysis with respect to applications for the provision of covered services using non-U.S. satellite systems licensed by WTO member countries, and that it is appropriate for the FCC to presume that proposed entries will promote competition in the U.S. basic telecommunications market.

10. The FCC's proposal to apply a rebuttable presumption in favor of granting Title III licenses for the provision of covered services using a non-U.S. satellite licensed by a WTO member country would promote foreign entry and competition in the U.S. basic telecommunications market while protecting it from anticompetitive practices. Not only does the GATS telecom agreement not prohibit a regulatory standard of this type, the procedure envisioned in the FNPRM is consistent with both the letter and spirit of the pro-competitive regulatory principles set out in the "reference paper" subscribed to by the United States in connection with the GATS telecom agreement[8] and incorporated in the U.S. Schedule of Specific

[8] The "reference paper" is a set of pro-competitive regulatory principles that 55 WTO members, including the United States, incorporated in their Schedules of Specific Commitments for basic telecom services as additional commitments under GATS Article XVIII. Ten other members incorporated additional commitments in their

Commitments.

11. For more detailed responses to comments concerning the U.S. obligations and commitments under the GATS telecom agreement, USTR directs the Commission to USTR's reply comments *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142 (October 17, 1997), and requests that those comments be incorporated in this rulemaking proceeding.

12. The Government of Japan and the European Commission (on behalf of the European Union and its Member States) oppose application by the FCC of the ECO-Sat test to services that fall within the scope the MFN exemption granted to the United States under the GATS telecom agreement, *i.e.*, DTH-FSS, DBS, and DARS services. They argue that these services are not "basic telecommunications services" and therefore should not be considered to fall within the U.S. list of Article II (MFN) exemptions under the GATS basic telecom agreement. In the view of these commenters, application by the FCC of the ECO-Sat test to firms from WTO countries that provide such services would be inconsistent with the MFN rule set out in GATS Article II.

13. In fact, however, the United States specifically inscribed DTH-FSS, DBS, and DARS services in its list of Article II exemptions appended to the GATS telecom agreement. Accordingly, the FCC is not required to provide MFN treatment to applicants seeking to access

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Schedules that draw upon, or are similar to, portions of the reference paper.

non-U.S. satellite systems to provide these services.

14. With respect to the FCC's request for comments on the application of the ECO-Sat test or an alternative to IGOs, the FNPRM is correct in its statement that the obligations imposed by the GATS do not cover measures affecting IGOs, which are intergovernmental treaty-based satellite organizations rather than "service suppliers" of particular WTO member countries within the meaning of the GATS. With respect to future IGO affiliates, the FCC's application of the ECO-Sat test should be governed by whether the licensing authority is a WTO member country. As with all Title III applications to provide covered services using a satellite licensed by a WTO member country, the FCC could condition or deny the license as necessary if the proposed service poses a very high risk to competition in the U.S. satellite market.

15. In summary, USTR considers that the FCC's final rules and policies will assure that the GATS telecom agreement produces the outcome desired by both the United States and other WTO member countries in concluding that agreement -- meaningful market access and non-discriminatory treatment leading to lower prices, the generation of higher market volumes, and the widespread deployment of the most advanced services in the global basic telecom market.

Respectfully submitted,

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